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IN THE

Supreme Court of the United States

..... TERM, 196....

No. 622

EMILIO PIZZARELLO,

Petitioner,

—against—

UNITED STATES OF AMERICA, EDWARD J. FITZGERALD, JR., District Director of Internal Revenue for the District of Manhattan and SHELDON COHEN, Commissioner of Internal Revenue of the United States of America,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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EMILIO PIZZARELLO,

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UNITED STATES OF AMERICA, EDWARD J. FITZGERALD, JR., District Director of Internal Revenue for the District of Manhattan and SHELDON COHEN, Commissioner of Internal Revenue of the United States of America,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari be granted to review the decision of the United States Court of Appeals for the Second Circuit, which affirmed an order entered by the United States District Court for the Southern District of New York, Inzer B. Wyatt, *J.*, which order denied Petitioner's motion for the convocation of a three judge court to hear and determine his application for an injunction restraining the enforcement, operation and execution of certain Acts of Congress, for repugnance to the Constitution.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit is reported at 408 F.2d 579 and is reprinted in the appendix hereto (1a). The opinion and order of the District Court on Petitioner's motion for the convocation of a three judge court is unreported and is reprinted in the appendix hereto (18a). The opinion and order of the District Court on Petitioner's motion for a preliminary injunction is reported at 285 F. Supp. 147 and is reprinted in the appendix hereto (19a).

Jurisdiction

The orders denying the motion for the convocation of a three judge court and the motion for a preliminary injunction were entered in the District Court on May 31, 1968. The judgment of the Court of Appeals was entered on March 18, 1969. A petition for rehearing was denied by the Court of Appeals on April 24, 1969. By order dated July 3, 1969, Mr. Justice Harlan granted an extension of time within which to petition for certiorari to September 20, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. § 2101(c).

Question Presented

Whether a three judge court should have been convened pursuant to 28 U.S.C. §§ 2282 and 2284 to hear and determine Petitioner's application for an injunction restraining the enforcement, operation and execution of 26 U.S.C. §§ 6331 and 6862 for repugnance to the constitution when the amended complaint explicitly sought such relief and when substantial constitutional questions were raised by Petitioner as Respondents' attempted to employ said statutes (1) to make, without either a demonstration of probable cause or a factual foundation, an arbitrary, exces-

sive and punitive jeopardy assessment for allegedly unpaid wagering taxes, and (2) to summarily seize property to satisfy the assessment without prior notice and hearing, when (3) a purpose of the tax is the punishment and deterrence of the activity taxed.

Constitutional Provisions Involved

THE JUDICIARY

Section 1: The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, unde. their Authority; * * *

* * * * *

FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

* * * * *

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment

of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * * * *

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Statutes Involved

26 U.S.C. § 6331. *Levy and distraint*

(a) Authority of Secretary or delegate.—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any offi-

cer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

(b) Seizure and sale of property.—The term "levy" as used in this title includes the power of distraint and seizure by any means. A levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary or his delegate may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

(c) Successive seizures.—Whenever any property or right to property upon which levy has been made by virtue of subsection (a) is not sufficient to satisfy the claim of the United States for which levy is made, the Secretary or his delegate may, thereafter, and as often as may be necessary, proceed to levy in like manner upon any other property liable to levy of the person against whom such claim exists, until the amount due from him, together with all expenses, is fully paid.

(d) Cross references.—

(1) For provisions relating to jeopardy, see subchapter A of chapter 70.

(2) For proceedings applicable to sale of seized property, see section 6335.

Aug. 16, 1954, c. 736, 68A Stat. 783; Nov. 2, 1966, Pub. L. 89-719, Title I, § 104(a), 80 Stat. 1135.

* * * * *

26 U.S.C. § 6862. *Jeopardy assessment of taxes other than income, estate, and gift taxes*

(a) Immediate assessment.—If the Secretary or his delegate believes that the collection of any tax (other than income tax, estate tax, and gift tax) under any provision of the internal revenue laws will be jeopardized by delay, he shall, whether or not the time otherwise prescribed by law for making return and paying such tax has expired, immediately assess such tax (together with all interest, additional amounts, and additions to the tax provided for by law). Such tax, additions to the tax, and interest shall thereupon become immediately due and payable, and immediate notice and demand shall be made by the Secretary or his delegate for the payment thereof.

(b) Immediate levy.—

For provision permitting immediate levy in case of jeopardy, see section 6331(a).

Aug. 16, 1954, c. 736, 68A Stat. 836.

* * * * *

26 U.S.C. § 7421. *Prohibition of suits to restrain assessment or collection*

(a) Tax.—Except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b) (1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether

or not such person is the person against whom such tax was assessed.

28 U.S.C. § 2282. *Injunction against enforcement of Federal statute; three-judge court required*

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 968.

* * * * *

28 U.S.C. § 2284. *Three-judge district court; composition; procedure*

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days' notice of the hearing shall be given to the governor and attorney general of the State.

If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State. June 25, 1948, c. 646, 62 Stat. 968; June 11, 1960, Pub. L. 86-507, § 1(19), 74 Stat. 201.

The federal wagering tax statutes (26 U.S.C. §§ 4401, 4411, 4412, 7203, 7262, and 7272) are set forth in the appendix (30a).

Statement

In March and April, 1965, Petitioner Emilio Pizzarello, was the proprietor of a stationery store luncheonette at 151 West Sanford Boulevard, Mount Vernon, New York (13, 49). According to undercover federal agents, between March 20 and April 15, 1965, in a storage room behind the store, Petitioner accepted 18 horse wagers totalling $290.00 from the agents and they saw him accept some other bets on the same occasions (49-50). At about 1:40 P.M. on April 15, 1968, a federal agent entered the back room of the luncheonette, arrested Petitioner for failure to pay the tax on the business of accepting wagers and searched him. He found $425. in currency, ten horse bet slips and one pay and collect slip (17, 50). Thereafter, at approximately 3:00 P.M., Petitioner was removed from the premises and he was taken before the United States Commissioner at about 5:50 P.M. The agents had no

search warrant, but after Petitioner's departure, they continued to illegally search the storage room. Nearly a half hour after he had appeared before the Commissioner, the agents caused Petitioner's safe to be opened in the back room of the store and seized $123,017. which they found inside. The money was mostly in large bills and accompanied in the safe by only such personal papers as insurance policies, mortgages and deeds. After the safe was opened, the agents continued to illegally search the storage room in the back of the store. They ultimately found and illegally seized an additional $2,440. in currency and four packets of betting slips from April 12, 13, 14 and 15, 1965 (13-14).

An information (65 Cr. 729) was filed on August 19, 1965 in the United States District Court for the Southern District of New York charging Petitioner with failure to register and pay the special tax on the business of accepting wagers (26 U.S.C. §§ 4401, 4411, et seq.). Petitioner pleaded not guilty and moved for the suppression and return of the property seized after the arrest. On October 25, 1965, the District Court held that the search and seizures, by which the agents had obtained the $123,017, the $2,440 and the four packets of slips, were illegal. The only seizures held lawful were those of the $425, the payoff card and the ten bet slips taken from Petitioner's person.

The trial court entered an order suppressing the illegally seized funds and the four packets of slips from April 12, 13, 14 and 15, 1965 (14). Thereafter, information 65 Cr. 729 was tried before a jury and the evidence of wagering activity by Petitioner was limited to the period between March 30 and April 15, 1965. Petitioner was found guilty (without wilful intent) on both counts. The Court of Appeals affirmed on November 17, 1967. On March 4, 1968, however, this Court granted certiorari, vacated the

judgment of the court below and remanded the case for further consideration in the light of *Marchetti* v. *United States,* 390 U.S. 30 (1968) and *Grosso* v. *United States,* 390 U.S. 62 (1968) (15). On May 22, 1968, the Court of Appeals remanded the case to the District Court with a direction that a judgment of acquittal be entered (14-15, 86).

In the criminal case, Petitioner did not testify on the trial and asserted his Constitutional privilege against self-incrimination as a defense against punishment for failure to comply with the requirements of the wagering tax statutes. As the Government conceded to this Court and as is implicit in the action of this Court in that case, the privilege was properly asserted (15-16).

Meanwhile, on July 9, 1965, the Government had filed libel 65 Ad. 704 praying for the forfeiture of the $125,882. seized from Petitioner. When the Government later sought to take Petitioner's deposition he properly invoked his privilege against self-incrimination (14-15, 42).

When this Court decided the *Marchetti* and *Grosso* cases, *supra* on January 29, 1968, the forfeiture case was still pending. On March 18, 1968, a District Judge signed an order to show cause why summary judgment should not be granted in the forfeiture action, on the basis of the *Marchetti* and *Grosso* cases. The motion was argued on April 2, 1968. In the moving papers and on argument, reference was made to the fact that Petitioner had invoked his privilege against self-incrimination in both the criminal case and on the deposition in the forfeiture action. In addition, the Assistant United States Attorney conceded on argument that the Government had no evidence regarding Petitioner's acceptance of wagers beyond that set forth in the affidavit in opposition (covering a

seventeen day period from March 30 to April 15, 1965) (16-18). Immediately after argument, the Assistant United States Attorney then in charge of the case also conceded that it was not unlikely that the Court would grant the motion for summary judgment (the Court did so on May 8, 1968 (34)). In addition, he evinced considerable interest in the fact that Petitioner had previously invoked his privilege against self-incrimination. He had not been involved in the criminal case or the forfeiture case at the time Petitioner had invoked the privilege, and implied that he had not been previously aware of the fact. He asked Petitioner's counsel about the specific time and status of the case when Petitioner had invoked the privilege. He was referred to the approximate time and circumstances and the two attorneys parted company (18-19).

In this context, more than three years after the $125,882. had been illegally seized from Petitioner, Respondents hastily * embarked upon an effort to impose the penalty of forfeiture of the $125,882 by indirect and unconstitutional means. Though Respondents concededly had no evidence of wagering activity outside of a period of about three weeks beginning in late March, 1965, they arbitrarily and capriciously made an enormous jeopardy assessment of $282,440.70, allegedly for unpaid wagering taxes for five years prior to that time, i.e. a period beginning April 1, 1960 (15-19, 27; opinion of Court below). Moreover, the figure supposedly representing the daily gross money receipts, and used in the computation back over the five year period, was an average total from the *illegally* seized slips dated April 12 through 14, 1965 (13-14; opinion of Court below).

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* Indeed, Respondents acted in such haste that the "Statement of Tax Due," Form 17-A, received by Petitioner on April 29, 1968 states that the claim is based on an audit of his tax returns when no returns were filed. In addition, the form is so out of date that it is not listed in the CCH index to forms.

There was no showing under oath of probable cause in support of the action taken by Respondents. The action was taken pursuant to the purported authority of 26 U.S.C. § 6862 upon the pretext that the Manhattan District Director believed in good faith that $282,440.70 in wagering taxes was due from Petitioner and that collection would be jeopardized by delay (48-49). Respondents prepared to collect the claim by summary seizure pursuant to the purported authority of 26 U.S.C. § 6331 and Petitioner commenced suit to protect his rights (opinion of Court below).

The complaint (1-8) was filed on May 8, 1968, and the amended complaint (30-39) was filed and served on May 22, 1968. The relief demanded includes an injunction restraining the enforcement, operation or execution of 26 U.S.C. §§ 6331, 6862 and related statutes to assess and collect claimed taxes by seizure without prior notice or hearing; restraining in like manner, the enforcement, operation or execution of the same statutes to determine, assess, levy or collect taxes on the business of accepting wagers pursuant to 26 U.S.C. § 4401; restraining the enforcement, operation or execution of the same statutes to determine, assess, levy or collect taxes by means of illegally seized evidence or property, and restraining levy to satisfy a purported wagering tax assessment of $282,440.70, against any property belonging to petitioner, and in particular against $125,882 which had been previously seized illegally from Petitioner by Respondents.

Subsequent to the commencement of the action, Petitioner made applications to the District Court for a temporary restraining order enjoining levy against the $125,882. illegally seized previously, or any other property of Petitioner; for a preliminary injunction (9-47) and for the convocation of a three judge court to hear and determine the application for an injunction (94-97).

Petitioner urged that 26 U.S.C. §§ 6331 and 6862 are unconstitutional on their face and as applied.* Petitioner further pointed out that, despite the absurdity of the size of the claim, the lack of evidentiary support for almost all of it and the improper use of illegally obtained property in computing it, Respondents necessarily contemplated that, one way or another, Petitioner would be severely penalized thereby. In the first place, since his theoretical legal remedy was a suit for refund, at the very least he could be irreparably harmed in the interim by levy upon real estate owned by him and by putting him out of business through seizure of the assets of his stationery store (13, 30, 34, 42-43). In the second place, Respondents were well aware that even the remedy of a suit for refund could not be pressed without incurring severe penalties. They knew that, if questioned about his finances for 1960-65, he would have to invoke the Fifth Amendment. He had done so already, Respondents were investigating his income tax returns for those years, and New York law makes bookmaking a serious crime (14-15, 42). In a suit for refund, however, unlike a forfeiture action, the taxpayer has the burden of proof. Therefore, Petitioner could not carry that burden without waiving his privilege and tending to incriminate himself of at least two felonies. The District Court was informed that Petitioner does not have the means to pay the $282,440.70 claimed and owns only a part of the $125,882. seized. Thus, to adhere to his privilege, Petitioner would have to abandon the illegally seized $125,882., fail to contest an arbitrary, capricious and tainted assessment and be permanently, hopelessly ruined economically (13, 30, 32-34, 42-47).

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* The opinion of the Court of Appeals erroneously states that Petitioner "argues essentially that the *wagering* tax is unconstitutional on its face and as applied."

The District Court granted the temporary restraining order, but later denied the application for the three judge court (18a) and the preliminary injunction and dismissed the action (19a). The Court held that 26 U.S.C. § 7421 deprived the District Court of jurisdiction to entertain applications for injunctions restraining the assessment or collection of taxes.

On appeal, the Court of Appeals for the Second Circuit held that, by the rationale of *Enochs* v. *Williams Packing Co.*, 370 U.S. 1 (1962), the District Court had jurisdiction to grant an injunction if Petitioner would be irreparably harmed by collection because it was clear that under no circumstances could the Government ultimately prevail. The Court held that the assessment was invalid because it was based on illegally procured evidence and also totally excessive because it was based on entirely inadequate information. The case was remanded for a hearing on the question of irreparable harm. At the same time, however, the Court affirmed the order which had denied the convocation of a three judge Court and stated that, because of the grounds upon which the case had been decided, it had been unnecessary to deal with the constitutional contentions raised (opinion of Court below). (The hearing on the issue of irreparable injury was held on May 22, 1969 and a single District Judge entered a decision on June 24, 1969 holding that Petitioner will suffer *no* irreparable injury in the absence of an injunction).

Reasons for Granting the Writ

Petitioner commenced an action, and moved, for an injunction barring and restraining conduct of Respondents under color of the statutes which purport to authorize the summary assessment and collection of excise taxes. He alleged that the relevant statutes, including 26 U.S.C.

§§ 6331 and 6862 do not provide authority for the assessment and collection of wagering taxes and that if Respondents had properly construed said statutes, they are unconstitutional. Appellant has also directly challenged the constitutionality of 26 U.S.C. §§ 6862 and 6331. He has requested that their enforcement be enjoined.

In such a situation, it is the duty of the District Judge to convene a three-judge Court to hear the case if the constitutional questions raised are not plainly insubstantial. 28 U.S.C. §§ 2282, 2284; *Schneider* v. *Rusk,* 372 U.S. 224 (1963). A single District Judge has no power to decide the merits, either by granting or withholding relief. See *Schneider* v. *Rusk, supra; Idlewild Bon Voyage Liquor Corp.* v. *Epstein,* 370 U.S. 713 (1962). This is true even when an alternative argument is advanced which is not founded on the Constitution. *Zemel* v. *Rusk,* 381 U.S. 1 (1965).

The constitutional questions raised by Petitioner below concerning the statutes involved included the following:

1. **26 U.S.C. §§ 6331 and 6826 are unconstitutional as applied as violative of the Sixth Amendment and the due process clause of the Fifth Amendment.**

When a tax is designed to penalize or deter a course of conduct, as well as raise revenue, a jeopardy assessment and collection by seizure pursuant to 26 U.S.C. §§ 6862 and 6331 are prohibited. Such action offends the Fifth and Sixth Amendment bars against the imposition of punishment for a crime without due process of law, including prior notice and jury trial. See *Lipke* v. *Lederer,* 259 U.S. 557 (1922); *Tovar* v. *Jarecki,* 173 F.2d 449 (7th Cir. 1949); *Coffey* v. *Nool,* 11 F.2d 399 (S.D. Va. 1926).

The principle plainly controls the instant case. It is settled that the wagering tax system was also designed to punish and/or deter. *Marchetti* v. *United States,* 390 U.S. 39, 47, 57, 58 (1968); *United States* v. *Kahriger,* 345 U.S. 22, 27-28 (1952), overruled on other grounds, *Marchetti* v. *United States, supra* (see also, dissent of Justice Frankfurter at 37); *Grosso* v. *United States,* 390 U.S. 62, 69 (1968) (See also, concurring opinion of Justice Brennan at 72); *United States* v. *Blank,* 261 F. Supp. 180 (N.D. Ohio 1966). Indeed, in the *Marchetti* and *Grosso* cases, this Court went as far as to reject one rationale which would have permitted criminal enforcement of the wagering tax system, because it would have been inconsistent with the punitive intent of Congress in enacting the legislation. *Marchetti* v. *United States, supra* at 58; *Grosso* v. *United States, supra* at 69.

Thus, while the wagering taxes have been held constitutional by this Court, they cannot be constitutionally enforced by summary assessment and seizure. An attempt to do so crosses the line into deprivation of due process. *Lipke* v. *Lederer, supra; Tovar* v. *Jarecki, supra; Coffey* v. *Noel, supra.*

By way of contrast, an effort to collect such a tax in compliance with constitutional requirements occurred in *United States* v. *Sanchez,* 340 U.S. 42 (1950). There, this Court considered the constitutionality of the federal tax on marihuana transactions, a tax similar in its punitive purpose to the wagering tax system. See *United States* v. *Kahriger, supra,* at 27.* In the *Sanchez* case, however, the Government did not attempt to proceed by summary assessment and seizure, but rather instituted a lawsuit for

* The similarity was even greater at the time of the *Sanchez* case since, like bookmaking today, traffic in marihuana was not then penalized by the United States except for tax provisions.

collection, a procedure which necessarily involved notice and hearing. This Court upheld the constitutionality of the marihuana tax and reversed the order dismissing the Government's action. Pains were taken, however, to distinguish the effort to collect the tax in the *Sanchez* case, pressed with judicial safeguards, from the summary assessments and attempted seizures of the *Lipke* and *Tovar* cases. *United States* v. *Sanchez, supra* at 45. The fact that this Court cited the *Tovar* case with approval is particularly noteworthy since, though that case also involved the marihuana tax, the court there issued an injunction and restrained the Government from proceeding by summary assessment and seizure.

The punitive nature of the wagering tax provisions is highlighted by the fact that, when enforced by jeopardy assessment and seizure, the invocation of the Fifth Amendment privilege against self incrimination is penalized. This is so because the taxpayer has the burden of proof in disputing a tax claim. *Helvering* v. *Taylor,* 293 U.S. 507 (1935). If the tax has not been collected the taxpayer must show that the assessment is arbitrary and capricious. *Helvering* v. *Taylor, supra; Federal National Bank* v. *Commissioner,* 180 F.2d 494 (10th Cir. 1950). If the tax has been collected, moreover, the taxpayer's burden in a suit for refund is not only to show that the assessment was arbitrary and capricious, but the amount of tax really owed, if any, and the amount of the sum collected to which the Government is actually entitled. *Helvering* v. *Taylor, supra.*

In cases like the instant case, however, the bookmaking conduct which gives rise to any tax liability is a crime in New York and every other state save one. See *Marchetti* v. *United States,* 390 U.S. 39, 44-46 (1968). In addition, the government is investigating the possibility, and strongly

suspects, that Petitioner failed to declare and pay the income tax upon profits from bookmaking for 1965 and prior thereto.

It is readily apparent, therefore, in such circumstances, that the burden of proof which Respondents seek to pass on is hopelessly inconsistent with the taxpayer's constitutional right against self incrimination. If Petitioner admitted to even a pittance in income from bookmaking that was unreported he would incriminate himself of a felony under federal law. Moreover, Petitioner was unable to register and pay the tax in the first place because he would have given evidence tending to incriminate himself of a felony under New York law. *Marchetti* v. *United States, supra;* New York Penal Law § 986-c. See also N. Y. Penal Law §§ 986 and 986-b; Revised N. Y. Penal Law, Article 225. It is self-evident that to carry the burden of proof in a suit for refund he would have to incriminate himself even more directly.

Thus, if the maneuver employed by Respondents were successful, Petitioner would have to waive his Fifth Amendment privilege to enforce his rights concerning funds seized, and an assessment computed, in violation of the Fourth Amendment. To adhere to his Fifth Amendment privilege Petitioner would have to forsake any claim to the illegally seized funds and any contest of the arbitrary and capricious assessment, computed by means of illegally seized evidence.

The Constitution forbids such a result. It is well settled that one may not be compelled to surrender his Fifth Amendment right to protect another right. *Spivak* v. *Klein,* 385 U.S. 511 (1967); *Garrity* v. *New Jersey,* 385 U.S. 493 (1967); *Gardner* v. *Broderick,* 392 U.S. 273, 20 L. Ed. 1082 (1968); *Boyd* v. *United States,* 116 U.S. 616

(1886). It is plainly no more permissible to require a taxpayer to incriminate himself to protect his property rights, than it was to require self-incrimination to pay the wagering taxes in the first place. *Marchetti* v. *United States, supra; Grosso* v. *United States, supra.*

In *United States* v. *Sanchez,* 340 U.S. 42 (1950), as noted above, the Government properly assumed the burden of proof. The Constitution requires no less in cases like this one. Cf. *Tot* v. *United States,* 319 U.S. 463, 369 (1943); *Paddock* v. *United States,* 280 F.2d 563, 566 (2d Cir. 1960).

2. 26 U.S.C. §§ 6331 and 6862 are unconstitutional on their face as violative of the Fourth Amendment and the due process clause of the Fifth Amendment.

The requirements of due process are a function of both the extent of the power claimed by the Government and the necessity therefor. See *Zemel* v. *Rusk,* 381 U.S. 1, 14 (1965). A legitimate governmental purpose must be accomplished by enabling authority no more inimical to freedom than necessary to effect the purpose. See *Aptheker* v. *Secretary of State,* 378 U.S. 500, 508, 516, 12 L. ed. 2d 992 (1964); *NAACP* v. *Button,* 371 U.S. 415, 432-33 (1963).

Thus, to apply the foregoing criteria to 26 U.S.C. §§ 6862 and 6331, it is necessary to consider the governmental interest sought to be protected and whether or not the same purpose could be accomplished by less drastic means. *Aptheker* v. *Secretary of State, supra* at 508. In that connection, it is plain that the power to tax is basic to the survival of any government. Also unquestionable is the legitimacy of the purpose to assure that tax revenues are not lost forever because of delay in collection while

the legality or size of a claim are litigated. Equally plain, however, is the fact that a delegation of the power to make a claim with no limit on discretion as to the legitimacy or size thereof, label the claim a tax assessment and enforce it by seizure prior to any review by an impartial body, literally invites abuse, unnecessary destruction of property rights and use of the power as a penalty. Cf. *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940). While the instant case provides a classic illustration of the use of an arbitrary and capricious assessment to invade property rights, it is by no means the first time Internal Revenue has embarked upon such a course. For example, in *Rinieri* v. *Scanlon,* 254 F. Supp, 469 (S.D.N.Y. 1966), an analogous case, the Government based a tax claim and seizure solely upon the discovery that plaintiff was in possession of the sum of $247,500. It was almost four years after the seizure before the claim was held wholly arbitrary and capricious and plaintiff recovered what was left of his money after attorney's fees. See also, *Field* v. *United States,* 263 F.2d 758 (5th Cir.), *cert. denied,* 360 U.S. 918 (1959).

It is worthy of note, regarding the criminal wagering tax charge of which Petitioner was originally convicted that (1) proceedings were commenced by an application for a warrant and (2) the maximum sentence which could have been imposed was a fine of $5,000. Now Respondents claim the power to cause irreparable damage by seizure (not only of funds, but of real estate and business assets) that would dwarf that sum in size without any application to a magistrate or limitation on their discretion or good faith. The Due Process clause of the Fifth Amendment and the Fourth Amendment guarantees "against unreasonable . . . seizures," make it evident that 26 U.S.C. §§ 6331 and 6862 could provide no such authority. Property rights are protected by the requirements for a warrant even if an invasion of those rights is attempted for a purpose un-

related to criminal law enforcement. *Camara* v. *Municipal Court,* 387 U.S. 523, 530 (1967). The guarantees apply to unreasonable seizures as well as searches. See *Kremen* v. *United States,* 353 U.S. 346 (1957); *Gouled* v. *United States,* 255 U.S. 298 (1921); *Warden, Maryland Penitentiary* v. *Hayden,* 387 U.S. 294, 307 (1967); *Harris* v. *United States,* 331 U.S. 145, 165-66 (1947) (dissent). Congress has no power to make unreasonable seizures and cannot delegate that power to another. *Cf. A. L. A. Schecter Poultry Corp.* v. *United States,* 295 U.S. 495, 549-50 (1935). As with arrest and search warrants, a showing under oath of probable cause regarding the legitimacy and size of a tax claim, prior to seizure of property in satisfaction thereof, is an eminently reasonable and necessary protection. It is also apparent that, as in the instant case, such a requirement would in no way prejudice the legitimate interests of the government. The only action which would be significantly impeded would be the abuse of the Constitutional right to property and the imposition of penalties without due process.

It is apparent that the constitutional questions discussed above rise considerably above the level of substantiality required. See *e.g., Zemel* v. *Rusk,* 381 U.S. 1 (1965); *Schneider* v. *Rusk, supra; Idlewild Bon Voyage Liquor Corp.* v. *Epstein,* 370 U.S. 713 (1962); *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144 (1963); *Stamler* v. *Willis,* 371 F.2d 413 (7th Cir. 1966); *Cooper* v. *Power,* 260 F. Supp. 207 (E.D.N.Y. 1966). A three judge court should be convened when a statute is unconstitutional as applied as well as when it is unconstitutional on its face. *Bennett* v. *Cottingham,* 290 F. Supp 759 (N.D. Ala. 1969), aff'd, 89

Sup. Ct. 554 (1969). There was therefore no justification for denial of the application for a three judge court.*

From the foregoing it is evident that the District Court and the Court of Appeals decided a federal question in conflict with the applicable decisions of this Court. Moreover, though the right to collect taxes by summary administrative proceedings was upheld in *Phillips* v. *Commissioner*, 283 U.S. 589 (1931), the important constitutional questions presented above were not then presented, and should be settled by this Court. If Petitioner's right to a three judge court is affirmed, those questions will certainly be presented to this Court on direct appeal from the decision of that court.

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* Lack of jurisdiction because of 26 U.S.C. § 7421, the ground relied upon by the District Court, has certainly been totally discredited. The Court of Appeals has held it untenable, even by the rigorous standards of *Enochs* v. *Williams Packing Co.*, 370 U.S. 1 (1962). Moreover, the statute has no application to taxes designed to penalize or deter a course of conduct in any event. See *Lipke* v. *Lederer*, 259 U.S. 557 (1922); *Tovar* v. *Jarecki*, 173 F.2d 449 (7th Cir. 1949), cited with approval in *United States* v. *Sanchez*, 340 U.S. 42, 45 (1950). Finally, no enactment by a legislature can validate action which the constitution prohibits. *Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 1107 (1952), *A fortiori*, Congress has no authority to withdraw by statute from the federal judiciary, the power to defend the constitution by whatever means necessary in law and equity. See U.S. CONSTITUTION, Article III, §§ 1 and 2; *Martin* v. *Hunter's Lessee*, 14 U.S. 303, 329-31 (1816); *Eisentrager* v. *Forrestal*, 174 F.2d 961, 966 (D.C. Cir. 1949), *rev'd on other grounds*, 339 U.S. 763 (1950). It necessarily follows, therefore, that Congress can not place limitations on the power of the courts to entertain suits for injunctions in cases where it is necessary to do so to protect a constitutional right. If the rule were otherwise, Congress would be able to authorize by statute, for example, the deprivation of property without due process of law in cases where such a deprivation would occur in the absence of injunctive relief.

Thus, when a substantial constitutional issue has been presented, this Court has held that 26 U.S.C. § 1721 has no application and that an injunction should issue. *Hill* v. *Wallace*, 259 U.S. 44 (1922). Indeed, in *Allen* v. *Regents*, 304 U.S. 430 (1938), this Court went so far as to hold that a preliminary injunction should have issued, even though the constitutional question was insubstantial enough so that the Court held against the taxpayer on that point.

CONCLUSION

For the aforesaid reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES G. STARKEY,
Counsel for Petitioner.

APPENDIX

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Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 110—September Term, 1968.

(Argued October 15, 1968 Decided March 18, 1969.)

Docket No. 32532

EMILIO PIZZARELLO,

Appellant,

—against—

UNITED STATES OF AMERICA, EDWARD J. FITZGERALD, JR., District Director of Internal Revenue for the District of Manhattan, and SHELDON COHEN, Commissioner of Internal Revenue of the United States of America,

Respondents.

Before:

WATERMAN and MOORE, *Circuit Judges,*
BONSAL, *District Judge.**

Appeal from an order of the District Court for the Southern District of New York, Inzer B. Wyatt, *Judge,* entered in an action to enjoin the levy of a jeopardy assessment for unpaid wagering taxes on money illegally seized, which order (1) denied appellant's application for a pre-

* Of the Southern District of New York, sitting by designation.

liminary injunction, (2) denied his application pursuant to 28 U.S.C. §§2282 and 2284 for a three-judge court to hear his suit for a preliminary injunction, and (3) dismissed his suit for a permanent injunction.

Reversed and remanded.

JAMES G. STARKEY, Brooklyn, N. Y., *for appellant.*

MARTIN PAUL SOLOMON, Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York, New York, N. Y., and Irwin B. Robins, Assistant United States Attorney, on the brief), *for respondents.*

Opinion of Court of Appeals

MOORE, *Circuit Judge*:

Emilio Pizzarello (appellant) appeals from an order of the District Court for the Southern District of New York, entered in an action to enjoin the levy of a jeopardy assessment[1] for unpaid wagering taxes on money illegally seized by the United States (the Government). The order, entered on May 31, 1968, denied appellant's application for a preliminary injunction against the levy on $125,882 in currency, obtained by Special Treasury Agents, to satisfy a tax assessment of $282,440.70. It also denied his application pursuant to 28 U. S. C. §§2282 and 2284 for a three-judge court to hear his suit for a preliminary injunction and directed dismissal of his suit for a permanent injunction.

The tax assessment of $282,440.70 was personally approved by the District Director of the Internal Revenue Service following an unsuccessful criminal prosecution of Pizzarello for illegal wagering activity and an equally unsuccessful forfeiture proceeding brought against the $125,882.[2] The background of these suits is set out in greater detail below.

The record in the criminal prosecution indicates that Pizzarello, a proprietor of a luncheonette in Mount Vernon, New York, was arrested on April 15, 1965, and charged with being in the business of illegally accepting wagers. He was searched incident to his arrest and ten horse bet slips, one pay and collect slip and $425 in currency were

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[1] Jeopardy assessments are authorized by 26 U.S.C. § 6862(a) if the District Director of Internal Revenue believes that the collection of a tax, other than income, estate or gift taxes, "will be jeopardized by delay." Afer a jeopardy assessment has been made and notice sent to the taxpayer, the tax becomes immediately due and payable.

[2] The forfeiture proceeding was brought pursuant to 26 U.S.C. § 7302 to forfeit the funds used in violation of the provisions of the internal revenue laws.

discovered, including marked currency given to him shortly before as a wager by an undercover agent.

Four hours after his arrest, Special Treasury Agents caused a wall safe in the back of the luncheonette to be opened and $123,017 in cash was discovered, along with insurance policies and a savings account book. Shortly thereafter, wedged between the metal top and a wooden leg of a table next to the safe, $2,440 and a large number of policy or betting slips were found. The total amount seized on April 5, 1965, therefore, amounted to $125,882.

In due course an information was filed alleging that Pizzarello had operated a gambling establishment illegally from March 30, 1965, to April 15, 1965, without registering with the District Director as required by 26 U. S. C. §4412 and without paying the special occupation tax imposed by 26 U.S.C. §4411. At about the same time, a libel of information was filed to forfeit the $125,882[3] seized on his arrest.

At a suppression hearing prior to his trial, the warrant under which Pizzarello had been arrested was declared to be invalid for lack of probable cause.[4] 65 Cr. 729 (S.D.N.Y. Oct. 25, 1965). With it fell the search and seizure by which the agents had obtained the $123,017 and the $2,440 and bet slips wedged under the table top. However, the remaining $425 in currency, the ten horse bet slips and the one pay and collect slip taken from Pizzarello's person inci-

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[3] Pizzarello asserts that he is the true owner of part of the $125,882, and the "true and bona fide" bailee of the remainder. The portion of the money held by him "for safekeeping" belongs to a relative and two employees, who, he states, have "authorized [him] to claim the return of all the money seized."

[4] However, Pizzarello's arrest was declared to be valid because the arresting officer, as a "private person," saw the appellant commit a misdemeanor in his presence. N. Y. Code of Criminal Procedure, § 183; *United States* v. *Viale*, 312 F. 2d 595 (2d Cir. 1963). 65 Cr. 729 (S. D. N. Y. Oct. 25, 1965).

dent to his arrest, as well as evidence of wagering transactions amounting to $290 placed by Special Agents with him and other gambling activities viewed by them were not suppressed and were used against him at his trial.

Notwithstanding his assertions that compliance with the registration and occupation tax provisions would have violated his Fifth Amendment privilege, the information resulted in conviction, without wilful intent, which was affirmed by this Court on November 17, 1967. *United States* v. *Pizzarello,* 386 F.2d 177 (2d Cir. 1967). However, the affirmance was vacated by the Supreme Court on March 4, 1968, and the case remanded in light of *Marchetti* v. *United States,* 390 U. S. 39 (1968) and *Grosso* v. *United States,* 390 U. S. 62 (1968).

Marchetti held that the registration and occupational tax provisions of the federal wagering tax laws could "not be used to punish criminally those persons who have defended a failure to comply with their requirements with a proper assertion of the privilege against self-incrimination." *Id.* at 42. The rationale was that since gambling was an "area permeated with criminal statutes," both federal and state, the obligation to register with the District Director created a "real and appreciable" hazard of self-incrimination.

Similarly, *Grosso* held that an individual cannot be prosecuted for failure to pay the wagering excise tax because of the same self-incriminatory hazards. The Court also concluded that the "required records" doctrine, *Shapiro* v. *United States,* 335 U. S. 1 (1948), could not be "appropriately applied to these circumstances," inasmuch as a gambler's records did not have "public aspects" which would render them at least analogous to public documents, and as the purpose of the United States' inquiry was financial, rather than "essentially regulatory." *Id.* at 67, 68. The interest of the United States was assumed to be

the collection of revenue and not the prosecution of gamblers. *Calamaro* v. *United States*, 354 U. S. 351, 358 (1957).

Subsequent to the *Marchetti* and *Grosso* decisions and the reversal of his criminal conviction, Pizzarello sought summary judgment against the United States in the forfeiture action.[5] By a decision dated May 7, 1968, Judge Tyler held that the "money having been determined to be non-forfeitable, the government has no further legal claim to the entire sum of $125,882" and that "this sum must be turned over to claimant Pizzarello." 286 F. Supp. 643, 646 (S. D. N. Y. 1968). However, before this decision, a "Statement of Tax Due," dated April 24, 1968, was sent to Pizzarello declaring a jeopardy assessment of $282,440.70 for unpaid taxes. No indication was given that the assessment was, in fact, for unpaid wagering taxes; the claim was said to be based "on an audit of [his] tax return for the period shown," although none had been filed.

As a result of the intervening jeopardy assessment, no order has been entered in the forfeiture suit and, as a levy was imminent on the $125,882, Pizzarello sought a preliminary injunction to restrain the collection of the tax. Contending that the jeopardy assessment, coming as it did before the filing of the opinion in the forfeiture proceeding, amounted to a frustration since it relegated him to a suit for refund, he argues that to meet the required burdens in a refund suit, he would be forced to waive his Fifth Amendment privilege, or give up the money. This alleged dilemma is said to permit the Government to achieve an indirect forfeiture under the guise of a jeopardy assess-

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[5] Inasmuch as a judgment of acquittal was subsequently entered in the criminal case, there was no violation of the internal revenue laws on which forfeiture of the funds could be predicated. See Note 2, *supra*. 286 F. Supp. 643, 646 (S. D. N. Y. 1968).

ment, having failed to achieve forfeiture directly. Because the tax claim becomes a lien in favor of the Government upon all property and rights to property of the taxpayer on assessment, Pizzarello asserts he will be ruined unless this Court reverses the District Court's refusal to grant an injunction against the assessment and levy.

At the outset, the Government challenges the power of this Court to grant the relief the appellant requests. The Government asserts, and the District Court so held, that injunctive relief is barred by 26 U. S. C. §7421(a), which, with exceptions not here relevant, provides:

> . . . no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax is assessed.

As both parties recognize, this provision has been construed by the Supreme Court in *Enochs* v. *Williams Packing Co.*, 370 U. S. 1 (1962), where Chief Justice Warren, speaking for a unanimous Court [Mr. Justice Frankfurter not participating], stated that, notwithstanding this mandate, it was proper to enjoin an attempted tax collection where "it is clear that under no circumstances could the Government ultimately prevail" *and* where "equity jurisdiction otherwise exists." *Id.* at 7.

The reasoning is that, because both requirements must be satisfied before an injunction can issue, the central purpose of the act is inapplicable. *Enochs, supra* at 7. That is to say, since a taxpayer must meet the "double burden," there would be no undue judicial interference with the United States raising its lawful revenue.

Applying the *Enochs* exception to this case, the question of whether the Government has a chance of ultimately prevailing is to be determined "under the most liberal view of the facts and the law." *Enochs, supra* at 7. Thus, where

it is apparent that the Government cannot establish its claim, only then does jurisdiction exist to enjoin the collection of the tax. In *Enochs,* liability for unpaid social security and unemployment taxes depended upon a resolution of the factual question as to whether an employee relationship existed between the owners of shrimp boats and their fishermen crews. The likelihood that the Government might prevail caused the Court to hold that "the Government's claim of liability was not without foundation." Therefore, judgment is to be made on the record before us as to whether the Government's claim of tax liability is without foundation. Since there are very few absolutes in the law, this judgment must be exercised in the light of the facts of this case in resolving the "under no circumstances" question, mindful, however, that the Supreme Court has stated, "To require more than good faith on the part of the Government would be to unduly interfere with a collateral objective of the Act—protection of the collector from litigation pending a suit for refund." *Enochs, supra* at 7, 8.

We begin with the assumption that a tax assessment is presumptively valid and that the burden is on the taxpayer to prove its invalidity. *Helvering* v. *Taylor,* 293 U. S. 507 (1935); *Commissioner* v. *Hansen,* 360 U. S. 446 (1959). Such a presumption is not evidence itself and disappears upon the introduction of evidence to overcome it. *Compton* v. *United States,* 334 F. 2d 212 (2d Cir. 1964); *New York Life Insurance Co.* v. *Gamer,* 303 U. S. 161 (1938); *Kentucky Trust Co.* v. *Glenn,* 217 F. 2d 462 (6th Cir. 1954).

Pizzarello attacks the assessment of $282,440.70 in wagering taxes, first, as excessive and, then, as illegal, because allegedly based on unlawfully obtained evidence. In addition, he argues essentially that the wagering tax is unconstitutional on its face and as applied. For the reasons which will become evident, we find it unnecessary to deal with the constitutional contentions raised by the appellant.

Appellant's position that the assessment of $282,440.70 is totally excessive is founded upon the manner by which the Internal Revenue Service admittedly calculated the tax. The District Director's affidavit explained that "A revenue agent of the Internal Revenue Service computed the gross wagers for the period from April 1, 1960, to April 15, 1965, inclusive, exclusive of Sundays, by applying to the days of operation the average of wagers accepted for April 12th, 13th and 14th, 1962." By this method, the total amount of wagers allegedly received amounted to $2,824,407; 10% of which, or $282,440.70, was the tax said to be due.

One engaged in the business of accepting wagers is required by 26 U. S. C. §§4403 and 4423 to keep daily records of the gross wagers received and to produce them "as frequently as may be needful to the enforcement of the [tax]." Pizzarello produced no records and the Government was obliged to estimate the volume and extent of his business. In so doing, as noted, it used a three-day average to calculate the wagers thought to have been received by the appellant over a five-year period.

But there is no proof in the record before us that Pizzarello operated as a gambler for five years or that, even if he did so operate, his three-day average of April 12th-14th, 1962, represented his average daily business for the other 1,575 days. No court could properly make such inferences without some foundation of fact.

The Government asserts, however, that the method chosen is proper, citing as authority *O'Neil* v. *United States,* 198 F. Supp. 367 (E. D. N. Y. 1961). There the Government had the defendant's records for the entire month of February. Using a figure which was approximately 75% of the total February slips, the gross receipts were computed by multiplying this "modified" February figure by sixteen months, the time his indictment charged

he had engaged in illegally accepting wagers. The District Court upheld the assessment, indicating that the Internal Revenue Agents did the best they could do under the circumstances at arriving at the proper figure. But there the Court had proof both of the duration and of at least a month's volume.

Assuming, but without deciding, that the calculation in the *O'Neil* case was proper, in the instant case the indictment charged Pizzarello with operating a bookmaking establishment only from March 30, 1965, until April 15, 1965. Where the Government got the date that Pizzarello was accepting wagers from April 1, 1960, is unsupported either by the record or by affidavits.[6] Moreover, while we recognize the difficulties faced by Treasury Agents and the need to estimate in situations of this nature, wagers received on three consecutive days can hardly be said to be representative of wagers received over a five-year period, even assuming Pizzarello accepted wagers for as long as the Government contends. Notwithstanding the Government's assertion that there is substantial evidence of an extensive gambling operation here, at his trial evidence of gambling activity was limited to a period of only slightly over two weeks.

The danger in compelling a taxpayer in a comparable situation to resort to a suit for refund is apparent. Serious and permanent injury may result before the legality of the tax can be determined. In *Rinieri* v. *Scanlon*, 254 F. Supp. 469 (S. D. N. Y. 1966), a jeopardy assessment of $247,820 was invalidated because the Court found that the tax, assessed without any substantiating evidence, was "arbitrary, capricious and unconscionable" and calculated

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[6] The Government asserts for the first time, in its Brief, that "The Internal Revenue Service was advised by the Yonkers Police that [Pizzarello's] luncheonette was being used to conduct a bookmaking business [from April 1, 1960] to April 14, 1965, inclusive."

so as to justify the seizure of $247,500 from plaintiff's person at Idlewild International Airport, New York. *Id.* at 474. Nearly four years elapsed before the tax claim was held to be wholly arbitrary. Here, Pizzarello has been deprived of his money since April 15, 1965. Because the District Director made a totally excessive assessment, excessive because based on entirely inadequate information, collection should be enjoined, if equity jurisdiction otherwise exists.

Aside from excessiveness, Pizzarello contends that the assessment of $282,440.70 is invalid because assertedly computed on the basis of illegally seized evidence. Two issues are raised by this contention. The first is whether the computation was, in fact, based on unlawfully obtained evidence? The second is, assuming that it was, does that conclusion make the assessment uncollectible? Beginning with whether the assessment was made with evidence illegally seized, the trial court states that this is unclear. Citing the affidavit of the District Director explaining how the computation was made, the court said it appeared "that the assessment was based wholly or in large part" on evidence from Pizzarello's person, lawfully obtained. However, the District Director's affidavit explicitly states that an Internal Revenue Agent computed the tax due from the "records seized during a search of [Pizzarello's] premises . . . on April 15, 1965." Since the search was held illegal at the suppression hearing, it is apparent that the records used were illegally obtained.

This conclusion is supported independently *dehors* the District Director's affidavit. The only properly obtained records were the ten horse bet slips and the one pay and collect slip found in Pizzarello's possession when he was arrested. Since these are hardly sufficient for an accurate determination of the wagers received over a period in excess of five years, the assessment must have been based in

substantial part, if not *in toto,* on unlawfully obtained evidence.

There remains the question of whether the fact that illegally seized evidence was used to compute the assessment renders the tax illegal. Widespread uncertainty is prevalent on the issue of whether evidence, inadmissible in a criminal case, can be used for other purposes, and the Supreme Court has yet to resolve the problem.

The closest case in point is the District Court case of *Lassoff* v. *Gray,* 207 F. Supp. 843 (W. D. Ky. 1962), which involved a fact situation nearly identical to the instant appeal. The plaintiffs sought to restrain the collection of wagering taxes assessed on illegally obtained evidence. The suit was initially dismissed on jurisdictional grounds, but, notwithstanding the anti-injunction prohibition contained in Section 7421(a), the dismissal was reversed by the Sixth Circuit, which remanded with directions that a hearing be held on the legality of the assessments and the existence of extraordinary circumstances which would warrant equitable relief. 266 F. 2d 745 (6th Cir. 1961). On the rehearing, the District Court concluded that since illegally seized evidence was used in calculating the assessment, the tax was invalid. However, in supplemental findings of fact and conclusions of law, rendered necessary by the intervening Supreme Court decision in *Enochs,* the Court reversed itself, stating that it could not conclude "under the most liberal view of the law and facts [existing] at the time these suits for injunction were filed, [that] it was clear the Government could not ultimately prevail." Its finding that the assessment was illegal, the Court stated, was "unnecessary for a decision." *Lassoff, supra* at 851.

The District Court's initial conclusion that the illegally seized evidence could not be used to assess a wagering

tax was based on a statement by Mr. Justice Holmes in *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385 (1920), where he declared, "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before this Court, but that it shall not be used at all." Id. at 392.

The number of cases where the exclusionary rule has been applied is far greater than those where it has not. The Supreme Court has held that the rule applies in forfeiture cases because such proceedings are quasi-criminal. *One Plymouth Sedan* v. *Pennsylvania,* 380 U. S. 693 (1965). Additionally, lower federal courts have excluded illegally obtained evidence in deportation proceedings, *Ex Parte Jackson,* 263 Fed. 110 (D. C. Mont. 1920), *appeal dismissed, Andrews* v. *Jackson,* 267 Fed. 1022 (9th Cir. 1920), in actions to recover duties on liquors imported into the United States, *Rogers* v. *United States,* 97 F. 2d 691 (1st Cir. 1938), in tax assessment cases, *Tovar* v. *Jarecki,* 83 F. Supp. 47 (N. D. Ill. 1948), [*dictum*], *reversed on other grounds,* 173 F. 2d 449 (7th Cir. 1949), and in discharge proceedings against a civil employee. *Powell* v. *Zuckert,* 366 F. 2d 634 (D. C. Cir. 1966).

When private individuals procure evidence in violation of the law, they are subject to civil and criminal liability. The existence of such liability as a deterrent is significant. Because of the resultant availability of civil and criminal remedies, some states have held evidence obtained by illegal private searches and seizures, if probative, admissible in civil suits between private litigants. *Sackler* v. *Sackler,* 15 N. Y. 2d 40, 203 N. E. 2d 481 (1964); *Diener* v. *Mid-American Coaches, Inc.,* 378 S. W. 2d 509 (Mo. 1964). Contra, *Williams* v. *Williams,* 8 Ohio Misc, 156, 221 N. E. 2d 622 (1966).

This case, however, while civil in nature is not between private parties and there are no analogous independent deterrents to, or remedies against, government violations of the Fourth Amendment. The prohibition against unreasonable searches and seizures is directed at governmental action. Absent an exclusionary rule, the Government would be free to undertake unreasonable searches and seizures in all civil cases without the possibility of unfavorable consequences. In such a situation, while the matter has not been settled by Supreme Court decision, it seems clear, even under a view of the law most favorable to the Government, that evidence so obtained would be excluded. Because Pizzarello's tax assessment was based in substantial part, if not completely, on illegally procured evidence, the assessment is invalid.[7]

The conclusion is reached that the assessment of $282,440.70 in wagering taxes is also excessive, arbitrary, and without factual foundation. It would, therefore, appear that the Government cannot ultimately establish its claim and that the first requirement of the *Enochs* exception is satisfied. If Pizzarello can show the existence of extraordinary circumstances justifying the intervention of equity, collection of this assessment should be enjoined.

Pizzarello asserts that unless he is granted an injunction he "will suffer immediate and irreparable damage." In his affidavit in support of an injunction, he lists his sole occupation as "proprietor of my stationery store-luncheonette," which nets an income of approximately $8,000 per year. His assets allegedly consist of a house in his wife's name, purchased for $25,000 with a mortgage

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[7] Despite the obligation imposed by 26 U.S.C. §§ 4403 and 4423 to make records available "as frequently as may be needful to the enforcement of this [tax]," appellant's records of wagering activity could not be subpoenaed under the "public records" doctrine of *Shapiro* v. *United States, supra. Grosso, supra.* at 67, 68.

of $9,312.58, and another house in the joint names of appellant and his mother. He contends that "she is the true owner" and "my name is used for the sake of convenience." He also has a bank account containing $1,292.21 and a 1958 Cadillac which he recently purchased "in bad condition for $150." His son and daughter have cars which they purchased.

His liabilities, as specified in his affidavit, aside from the mortgage, include fuel bills of $1,471.98 for his home and "those relatives who are my responsibility," unpaid medical bills of $3,130, $12 a week for his mother's care at a nursing home and $221 a month for special schooling for his son "because of a disability."

A tax claim becomes a lien in favor of the Government on all property of the taxpayer upon assessment, 26 U. S. C. §§6321 and 6862. The assessment of $282,440.70 is, therefore, a lien on all of Pizzarello's assets, which would certainly seem to be insufficient to cover the tax.

The District Court, however, concluded that this "is of no moment because the 'full payment' principle in respect to income taxes does not appear to be applicable to excise taxes which 'may be divisible into a tax on each transaction or event, so that the full payment rule would probably require no more than payment of a small amount.'" *Flora* v. *United States*, 362 U. S. 145, 175 n. 38 (1962). In short, the Court concluded that Pizzarello would not suffer irreparable harm because his remedy at law was adequate. That is to say, he could pay the tax on one transaction and thereafter institute a suit for refund.

Appellant urges, nonetheless, that this legal remedy is inadequate because compliance with the burdens imposed on a taxpayer seeking a refund would open him to substantial hazards of self-incrimination. He states he would no more be able to realistically recover his money in a

suit for refund on a single wagering transaction than he would for a refund if he had paid the entire amount, without making himself vulnerable to state or federal prosecution for illegal gambling activity. He contends that in such a suit he has the burden not only of proving the assessment invalid, but also of proving the amount, if any, to which the Government is properly entitled. To meet the second burden, he asserts that he would have to testify to his gambling activities, thereby exposing himself to prosecution in New York. His sole alternative allegedly would be to forfeit the $125,882.

The situation facing Pizzarello is not too dissimilar from that presented to the Seventh Circuit in *United States* v. *United States Coin and Currency in the Amount of $8,674.00,* 393 F. 2d 499 (7th Cir., 1968), where the court said:

> "The prospect of a felony conviction involved in *Marchetti* of course has a greater coercive effect than the possible loss of money involved herein. On the other hand, the prospect of losing in excess of $8,000 has a substantial coercive effect. In this respect, the landmark case of *Boyd* v. *United States*, 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746, is controlling. *Boyd* was a civil forfeiture action in which the claimant was given a choice between producing a possibly incriminating document and forfeiting the property. The Court held that such a choice was impermissible under the Fourth and Fifth Amendments. See *Garrity* v. *State of New Jersey,* 385 U. S. 493, 496-497, 87 S. Ct. 616, 17 L. Ed. 2d 562, which reaffirms and follows *'Boyd.'' Id.* at 500.'

The financial burden imposed by levying against his personal and business property may, in fact, result in irreparable injury. An allegation of irreparable injury to a

taxpayer through forced sale of his business, if proven, has been held to be grounds for equitable relief. *Midwest Haulers* v. *Brady*, 128 F. 2d 496 (6th Cir. 1942). However no hearing has been held below on what economic damage Pizzarello may suffer if collection is not enjoined. Although it appears on the record before us that he is likely to suffer serious hardship, we feel it wiser to remand for a complete hearing where the facts can be more fully disclosed.

We understand that the amount seized on April 15, 1965 is currently lodged in the Office of the United States Marshal for the Southern District of New York. It is ordered that this sum remain in his custody pending the entry of final judgment herein and pending any and all appeals therefrom.

For the reasons indicated, the order denying an injunction and directing dismissal is reversed. The case is remanded to the District Court for further proceedings not inconsistent with this opinion. The order denying the appointment of a three-judge court is affirmed.

Opinion and Order Denying the Application for the Convocation of a Three-Judge Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

68 Civ. 1883

EMILIO PIZZARELLO,

Plaintiff.

—v—

UNITED STATES OF AMERICA, *et al.*,

Defendants.

This is a motion for plaintiff for the convening of a three judge court under 28 U.S.C. §2282 to hear and determine his application for a temporary injunction.

By order with opinion being filed this date, judgment is directed to be entered dismissing the action because 26 U.S.C. §7421(a) deprives the Court of jurisdiction over the subject matter. For the same reason a three judge district court would have no jurisdiction. See *Jules Hairstylists, etc.* v. *United States*, 286 F. Supp. 511 (D. Md. 1967).

The motion is denied.

SO ORDERED.

Dated: May 31, 1968

INZER B. WYATT,
United States District Judge

Opinion and Order Denying the Application for an Interlocutory Injunction and Dismissing the Action

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

68 Civ. 1883

EMILIO PIZZARELLO,

Plaintiff,

—against—

UNITED STATES OF AMERICA, EDWARD J. FITZGERALD, JR., District Director of Internal Revenue for the District of Manhattan, SHELDON COHEN, Commissioner of Internal Revenue of the United States of America,

Defendants.

APPEARANCES:

JAMES G. STARKEY, ESQ.,
Attorney for Plaintiff,
32 Court Street,
Brooklyn, New York 11201.

ROBERT M. MORGENTHAU, ESQ.,
United States Attorney,
Attorney for Defendants.

MARTIN PAUL SOLOMON, ESQ.,
Assistant United States Attorney,
Of Counsel.

Opinion and Order Denying the Application for an Interlocutory Injunction and Dismissing the Action

WYATT, District Judge.

This is a motion by plaintiff (Emilio) for a preliminary injunction (Fed. R. Civ. P. 65) restraining defendants from levying (26 U.S.C. § 6331(a)) to satisfy an assessment of taxes against Emilio made by the Internal (80) Revenue Service (the Service) on April 25, 1968. The action is in substance for the same relief permanently.

Emilio is the proprietor of a stationery store and luncheonette located at 151 West Sanford Boulevard, Mount Vernon, New York.

On April 15, 1965, Emilio was arrested in the back room of his store by special agents of the Service who had an arrest warrant issued on a complaint of violation of federal wagering tax laws. A search of Emilio conducted incident to his arrest disclosed $425 in currency on his person and some betting slips. Some three hours later, the agents caused a safe in the storage room of Emilio's store to be opened; currency in the amount of $123,017 was found and seized. Other currency in the sum of $2,440 was at about the same time seized from other locations in the storage room, along with three bundles of bets wrapped up in racing forms. The total of the money seized on April 15 was thus $125,882.

On July 9, 1965, the government filed a libel of information (65 Ad. 704) to forfeit (26 U.S.C. § 7302) the $125,882 in currency seized on April 15. In due course Emilio filed a claim to the money as its owner.

When property is seized by revenue officers and is "forfeitable", it may, at the option of the Service, be put in the "custody and *control*" of the Marshal, that is, in advance (81) of the filing of a libel (26 U.S.C. § 7322; emphasis supplied). In this instance, the property was not put in the custody and control of the Marshal before filing the libel.

Forfeiture is by "a proceeding in rem" (26 U.S.C.

§ 7323), and where the Court does not already have the property, jurisdiction is obtained by securing its possession in the Court so that control over the property may be exercised and the Court's decree made effective.

When the libel was filed against the currency seized from Emilio, a writ of attachment duly issued. The currency, then in the physical possession of the Service at 90 Church Street, was on July 14, 1965 attached and taken under control of the Marshal by proper service of the writ on the appropriate representative ("property coordinator") of the Service. Physical possession was not then changed but from that date the property has nevertheless been in the custody of the Court (and on May 29, 1968, I directed the Marshal to take the property into his physical possession).

An information (65 Cr. 729) was filed on August 19, 1965 charging Emilio in two counts with violations of the federal wagering tax laws (26 U.S.C. §4401, 4411 and related sections). Emilio pleaded not guilty.

Emilio moved under Fed. R. Crim. P. 41(c) for the (82) return of the money seized and for its suppression for use as evidence. He successfully contended before Judge Murphy that the arrest warrant was invalid but Judge Murphy sustained the arrest as one by a private citizen who saw Emilio commit a misdemeanor in his presence (accepting wagers illegally); such an arrest is valid under New York law (*United States* v. *Viale*, 312 F.2d 595 (2d Cir.), cert. denied, 373 U.S. 903 (1963)). Since the $425 in currency and "ten betting slips" were taken in a search incident to a lawful arrest, Judge Murphy would not suppress this property for use as evidence nor direct its return to Emilio. On the other hand, the currency seized three hours later (in total $125,457) and the bundle of bets then taken were held to have been illegally seized because not incident to the arrest. The government contended

that this property should not be ordered returned, however, because it was subject to forfeiture under 26 U.S.C. § 7302. Without passing on the merits of this contention Judge Murphy denied that part of Emilio's motion which sought the return of the $125,457 and the bundle of bets on condition that the government before November 1, 1962 file a libel for its forfeiture (Judge Murphy was evidently not aware that a libel had already been filed). The order with opinion of Judge Murphy was filed October 25, 1965.

A motion for Emilio for summary judgment in the forfeiture case was denied by Judge (now Chief Judge) Sugarman by order with opinion filed March 22, 1966. Chief Judge (83) Sugarman ruled that under *One 1958 Plymouth, etc.*, v. *Commonwealth of Pennsylvania,* 380 U.S. 693 (1965) a forfeiture could not be supported *solely* by illegally seized evidence but that there had to be a trial of Emilio's case because "independent" and untainted evidence was available. The motion before Judge Sugarman was for summary judgment "in favor of the claimant" but the moving affidavit made it clear that the motion was for partial summary judgment because it did not include the $425 and "ten betting slips" taken from Emilio's person.

The trial of the information in the criminal case was before Judge Frankel and a Jury. There was a verdict of guilty on both counts (but "without wilful intent", thus excluding a violation of 26 U.S.C. § 7203) and judgment of conviction was entered on May 10, 1966. The Court of Appeals affirmed on November 17, 1967 (386 F.2d 177).

On January 29, 1968, the Supreme Court decided that the federal wagering tax laws could not be used to punish criminally those who (as did Emilio) defend their violations on Fifth Amendment grounds. *Marchetti* v. *United States,* — U.S. — 88 S. Ct. 697.

Opinion and Order Denying the Application for an Interlocutory Injunction and Dismissing the Action

On March 4, the Supreme Court granted certiorari in Emilio's case, vacated the judgment and remanded, etc. — U.S. — 88 S. Ct. 899.

(84)

On March 18, Emilio obtained an order requiring the government to show cause why there should not be summary judgment for him in the forfeiture case. This motion was heard by Judge Tyler on April 2.

A "Statement of tax due" dated April 26, 1968, on "Form 17-A" was then sent by the Service to Emilio. This shows an "assessment" of $282,440.70 on April 25, 1968 as "additional Federal tax due, based on an audit of your tax return for the period shown". The "period" may be deciphered as "4/1/60 to 4/14/65". It is stated that the amount assessed "should be paid" within ten days. Presumably this Form 17-A is the "notice and demand" (after assessment) referred to in 26 U.S.C. § 6861(a) and § 6862(a)).

It cannot be determined from Form 17-A what kind of tax has been assessed but the taxpayer on "request" may secure certain information (26 U.S.C. § 6203), including the "character of the liability assessed" (Treas. Reg. § 301.6203-1). It does not appear that Emilio has made any such "request".

An affidavit (sworn to May 14, 1968) is submitted of the District Director of Internal Revenue, who on April 25, 1968, personally approved a "jeopardy assessment" against Emilio of $282,440.70 under 28 U.S.C. § 6862(a). The assessment is stated to be for excise taxes under 26 U.S.C. § 4401. (85) The District Director explains that incident to the arrest on April 15, 1965, "records" were seized which showed the wagers accepted by Emilio on April 12, 13, and 14, 1965; that the average of wagers accepted on those days was multiplied by the number of days

(excluding Sundays) between April 1, 1960 and April 14, 1965; and that this resultant figure was $2,824,407. The 10% tax on this amount under 26 U.S.C. § 4401 is the amount of the assessment.

On May 8, Judge Tyler filed an opinion holding that the government had no legal claim to the $125,882 in currency and that this property must be turned over to Emilio. No order has yet been entered on Judge Tyler's decision and a motion for reargument made by the government is returnable on June 4.

The case at bar was commenced on May 8, the date of the filing of Judge Tyler's opinion in the forfeiture case.

The complaint avers a scheme by defendants unlawfully to deprive Emilio of the seized money by assessment of taxes without "lawful or sufficient evidence" for such assessment and by seizure of the money under the assessment before delivery can be made to Emilio under an order of this Court in the forfeiture case. It is averred that the object of the assessment is to "relegate plaintiff to a suit for (86) refund" in which the burden of proof would be "hopelessly inconsistent" with the self-incrimination privilege and that thus defendants would by assessment "indirectly" forfeit the money when they could not accomplish the forfeiture "lawfully" in the forfeiture case.

On May 22, an amended complaint was filed (Fed. R. Civ. P. 15(a)). The amendment adds an averment of the decision of Judge Tyler, adds averments that Emilio cannot pay the assessment and that unless he has an injunction he will lose the money and also other property (such as a house), and adds an averment that if certain statutes—26 U.S.C. §§ 6201, 6301, 6321, 6331 and 6862—authorize the April 25, 1968 assessment, then they are unconstitutional.

Opinion and Order Denying the Application for an Interlocutory Injunction and Dismissing the Action

The relief demanded in the amended complaint is principally and in substance that defendants be enjoined from collection of the tax assessed and especially that they be enjoined from levy (26 U.S.C. § 6331) on the currency in the Court's custody and that the assessment "be declared null and void."

On May 22, 1968, the Court of Appeals remanded Emilio's criminal case to this Court with direction that a judgment of acquittal be entered.

(87)

The obstacle which bars the maintenance of this action and which requires denial of the present motion is the statute, on the books in substantially the same form since at least 1867 and now 26 U.S.C. § 7421(a). That section, omitting exceptions not here relevant, reads as follows:

> " . . . no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed."

On its face the statute bars any relief here. On facts very similar to those in the case at bar, it has been held in a careful opinion that no injunction may issue. *Lassoff* v. *Gray,* 207 F. Supp. 843 (W.D. Ky. 1962).

The only time when an injunction against collection of a tax may be issued, despite Section 7421(a), is where a plaintiff shows (a) that collection would cause irreparable injury and (b) that "it is clear that under no circumstances could the Government ultimately prevail". *Enochs* v. *Williams Packing Co.,* 370 U.S. 1, 7 (1962). As to the second requirement it amounts to a showing of bad faith on the part of the government (370 U.S. at 7).

Opinion and Order Denying the Application for an Interlocutory Injunction and Dismissing the Action

With respect to irreparable harm, if the tax as assessed is collected, Emilio may bring an action in a District Court for a refund. 28 U.S.C. § 1346(a)(1). His affidavit states that he "cannot pay the assessment" but this is of no (88) moment because the "full payment" principle in respect of income taxes (*Flora* v. *United States,* 362 U.S. 145 (1962) does not appear to be applicable to excise taxes which "may be divisible into a tax on each transaction or event, so that the full-payment rule would probably require no more than payment of a small amount" (*Flora* v. *United States,* above, at 175 n. 38). See also *Vuin* v. *Burton,* 327 F.2d 967 (6th Cir. 1964), a wagering tax case very similar to that at bar. The affidavit of Emilio also states that if levy is permitted under the assessment, he will be "personally ruined and ruined in my business". This is much too general and conclusory to establish any irreparable injury. The primary object of the present motion is to prevent levy on the $125,882 in currency. Emilio has been without this sum since April 15, 1965; surely it cannot be any irreparable injury, after levy on the currency, to bring the normal action for a refund.

But Emilio fails moreover to establish that "under no circumstances could the Government ultimately prevail" (370 U.S. at 7).

The assessment is presumptively valid and the burden is on Emilio, no matter in what type of proceeding, to show that it is invalid. *Helvering* v. *Taylor,* 293 U.S. 507, 515 (1935); *United States* v. *Rindskepf,* 105 U.S. 418, (89) 422 (1881).

The tax on wagers in 26 U.S.C. §4401 has been held to be constitutional. *Marchetti* v. *United States,* 88 S. Ct. at 700, 708 (1968).

A contention here is that assessment and levy "without notice and hearing" violates the due process clause. Such

a contention was long ago rejected by Mr. Justice Brandeis, speaking for a unanimous Court, in *Phillips* v. *Commissioner,* 283 U.S. 589, 595-96, 696-97 (1931):

> "The right of the United States to collect its internal revenue by summary administrative proceedings has long been settled. Where, as here, adequate opportunity is afforded for a later judicial determination of the legal rights, summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained. . . . Property rights must yield provisionally to governmental need. Thus, while protection of life and liberty from administrative action alleged to be illegal, may be obtained promptly by the writ of habeas corpus, . . . the statutory prohibition of any 'suit for the purpose of restraining the assessment or collection of any tax' postpones redress for the alleged invasion of property rights if the exaction is made under color of their offices by revenue officers charged with the general authority to assess and collect the revenue. . . .
>
> "Where only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate."

Another contention appears to be that the assessment is plainly illegal because based on evidence illegally seized. (90) In point of fact, this does appear to be established. It will be remembered that Judge Murphy found that "ten betting slips" and $425 in currency were legally seized from Emilio's person. It may well be that the assessment was based wholly or in large part on this evidence. The

affidavit of the District Director is not entirely clear; he says that the computation was based on "records seized during a search of the premises incident to (Emilio's) arrest". This points to some extent to the later seizures but the words may not have been carefully chosen with the present point in mind and in any event the burden is on Emilio to show the assessment invalid. In point of law, there is even greater doubt. It is by no means clear that evidence illegally seized and inadmissible in a criminal proceeding (*Weeks* v. *United States,* 232 U.S. 393 (1914) and *Mapp* v. *Ohio,* 367 U.S. 643 (1961)) or in a forfeiture (a quasi criminal) proceeding (*One 1958 Plymouth, etc.* v. *Commonwealth of Pennsylvania,* above) is also inadmissible in a federal tax proceeding, much less barred for use as the basis for an assessment. The views of lower courts appear to be divided in respect of civil proceedings. *Compton* v. *United States,* 334 F.2d 212, 217 n. 11 (4th Cir. 1964). The decision in *United States* v. *Physic,* 175 F.2d 338 (2d Cir. 1949), cited in the footnote in *Compton* (91) was in a forfeiture case. The Supreme Court has apparently never decided the point. That the answer is at least doubtful is seen from the reason given for the *One 1958 Plymouth, etc.* decision, namely, that forfeiture proceedings while civil in form are in substance criminal and that this "nature of a forfeiture proceeding" leads to the conclusion that the exclusionary rule is applicable in such proceedings (380 U.S. at 702, also 697).

In any event, a suit for an injunction is not the proper way to question the use of illegally seized evidence as the basis of a tax assessment. *Zamaroni* v. *Philpott,* 346 F.2d 365 (7th Cir. 1965).

Another contention appears to be that because the existence of the property was discovered by an illegal seizure, then there may be no levy on the property under a jeopardy

assessment. This contention is without merit. In a case in the Fifth Circuit very similar to the case at bar, the contention was rejected in a well reasoned opinion of Judge John R. Brown. *Field* v. *United States,* 263 F.2d 758 (1959), cert. denied, 360 U.S. 918 (1959).

Further discussions of contentions for Emilio seems unnecessary.

It is *not* "clear that under no circumstances could the Government ultimately prevail" (379 U.S. at 7).

It is *not* "apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim" (370 U.S. at 1).

Where Section 7421(a) is applicable, as here, the *Enochs* opinion states that this Court is "without jurisdiction" (370 U.S. at 7). See also *Zamaroni* v. *Philpott* above.

The findings of fact and conclusions of law required by Fed. R. Civ. P. 52(a) are contained in what has been written above.

The motion for a preliminary injunction is denied.

The Clerk is directed to enter judgment dismissing the action for lack of jurisdiction of the subject matter (Fed. R. Civ. P. 12(b)(3)).

To permit plaintiff an opportunity to apply to the Court of Appeals for a stay pending any appeal from this order, defendants are stayed until June 11, 1968 from making any levy in respect of the taxes assessed against plaintiff on April 25, 1968.

So Ordered.

Dated: New York, New York
May 31, 1968

Inzer B. Wyatt,
United States District Judge

Wagering Tax Statutes

26 U.S.C. § 4401.

§ 4401. *Imposition of Tax.*

(a) *Wagers.*

There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) *Amount of wager.*

In determining the amount of any wager for the purpose of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer established, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) *Persons liable for tax.*

Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him. . . .

26 U.S.C. § 4411.

§ 4411. *Imposition of tax.*

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable. . . .

26 U.S.C. § 4412.

§ 4412. *Registration.*

(a) *Requirement*

Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

26 U.S.C. § 7203.

§ 7203. *Willful failure to file return, supply information, or pay tax.*

Any person required under this title to pay an estimated tax or tax, or required by this title or by regulations

made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulation, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000 or imprisoned not more than 1 year, or both, together with the costs of prosecution.

26 U.S.C. § 7262.

§ 7262. *Violation of occupation tax laws relating to wagering—failure to pay special tax.*

Any person who does any act which makes him liable for special tax under subchapter B of chapter 35 without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000.

26 U.S.C. § 7272.

§ 7272. *Penalty for failure to register.*

Any person (other than persons required to register under subtitle E, or persons engaging in a trade or business on which a special tax is imposed by such subtitle) who fails to register with the Secretary or his delegate as required by this title or by regulations issued thereunder shall be liable to a penalty of $50.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 622

EMILIO PIZZARELLO, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner filed a complaint in the United States District Court for the Southern District of New York asking that respondents, the United States and officials of the Internal Revenue Service, be restrained from collecting wagering taxes which had been assessed against him. Petitioner challenged the constitutionality of those sections of the Internal Revenue Code under which respondents purported to be acting and asked that a three-judge court be con-

vened pursuant to 28 U.S.C. 2282 (Pet. 13-14, 18a, 20a, 24a-25a). The district court, being of the view that it was without jurisdiction to enjoin the assessment or collection of a tax under Section 7421(a) of the Code,[1] refused to convene a three-judge court (Pet. 18a) and dismissed the complaint (Pet. 20a-29a; 285 F. Supp. 147).

On appeal, the Second Circuit held (Pet. 7a), in accordance with this Court's decision in *Enochs* v. *Williams Packing & Nav. Co., Inc.*, 370 U.S. 1, that notwithstanding the seemingly absolute language of Section 7421(a), "'it was proper to enjoin an attempted tax collection where 'it is clear that under no circumstances could the Government ultimately prevail' *and* where 'equity jurisdiction otherwise exists.'"

The court of appeals found that petitioner had satisfied the first of the two tests prescribed in *Enochs* v. *Williams Packing & Nav. Co.* because the assessment was excessive and based on entirely inadequate information[2] (Pet. 7a-11a, 14a), and be-

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[1] In pertinent part Section 7421(a) provides:

"* * * no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed."

[2] The court of appeals held that the Commissioner could not properly assess gambling taxes for a five year period on records covering only three days of petitioner's operation (Pet. 9a-11a). This appears to conflict with a recent decision of the Seventh Circuit. *Mitchell* v. *Commissioner*, No. 17363, decided August 20, 1969. See also *Shades Ridge Holding Co.*,

cause it was based, at least in substantial part, on illegally seized evidence[3] (Pet. 11a-14a). The court determined, however, that petitioner had failed the second test prescribed since "no hearing had been held below on what economic damage Pizzarello may suffer if collection is not enjoined" (Pet. 17a). It accordingly remanded the case to the district court for a hearing on the question whether petitioner's remedy at law would be adequate,[4] or whether he would suffer irreparable injury if equitable relief were denied (Pet. 14a-17a). The district court's refusal to convene a three-judge court was affirmed (Pet. 17a), and the present petition for a writ of certiorari is addressed solely to this refusal of a three-judge court.

The opinion of the Second Circuit was handed down on March 18, 1969 (Pet. 2). On April 24, 1969, petitioner's request for a rehearing was denied

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Inc. v. *Commissioner*, 23 T.C.M. 27,014, affirmed *sub nom. Fiorella* v. *Commissioner*, 361 F. 2d 326 (C.A. 5); *Mersel* v. *United States*, No. 25,428, decided October 2, 1969 (C.A. 5); *Mladinich* v. *United States*, No. 27380, decided October 2, 1969 (C.A. 5). It should also be noted that the instant case came before the Second Circuit on a preliminary injunction record. The government had never answered the complaint and there had never been a hearing on the merits.

[3] The court of appeals noted that this Court has never decided whether illegally seized evidence may be used in a civil case (Pet. 12a). *Cleary* v. *Bolger*, 371 U.S. 392, 403, 413 (concurring and dissenting opinions); *Compton* v. *United States*, 334 F. 2d 212, 217 (C.A. 4).

[4] Since the tax in question is an excise tax petitioner can institute a refund action in the district court for the recovery of any tax collected.

(Pet. 2). No request having been made for a stay, the mandate was forwarded to the district court on May 6, 1969. The hearing directed by the Second Circuit was held on May 22, 1969, and on June 24, 1969, the district court filed a memorandum opinion in which it found that petitioner would suffer no irreparable injury upon denial of the injunctive relief sought by his complaint (Pet. 15). We have been informed by the United States Attorney that petitioner moved on July 2, 1969, for a reopening of the hearing in the district court; that this motion has been denied; and that no final order has been entered to date.[5] Accordingly, the court of appeals has not yet had any opportunity to review the findings of fact on remand.

Since petitioner is still pursuing his remedies in the lower courts, the case is not ripe for review in this Court. If petitioner has an adequate remedy at law, as the district court has held, Section 7421(a), as construed in *Enochs* v. *Williams Packing & Nav. Co., Inc.*, would bar injunctive relief, and there would be no basis for convening a three-judge court. *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715; *Howfield, Inc.* v. *United States*, 409 F. 2d 694 (C.A. 9).

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[5] Approximately $126,000 in currency, seized under a jeopardy assessment on April 15, 1965, has been ordered to remain in the custody of the United States Marshal pending the outcome of this case (Pet. 3a-4a, 17a). The United States Attorney advises that the government has agreed, in writing, not to levy upon petitioner's business or real estate pending the outcome of the case.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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OCTOBER, 1969.

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